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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: SEP 13 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or as a member of the professions holding an advanced degree. The petitioner, a digital printing company, seeks to employ the beneficiary as a prepress production manager. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the beneficiary qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel, who requests oral argument. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, U.S. Citizenship and Immigration Services (USCIS) has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, counsel identified no unique factors or issues of law to be resolved. In fact, counsel set forth no specific reasons why oral argument should be held. Counsel asserts that the director is not sufficiently familiar with the printing industry to render an informed judgment about the beneficiary's role therein, but this is not a unique factor or issue of law that cannot be adequately addressed in writing. Moreover, the written record of proceedings fully represents the facts and issues in this matter. Consequently, we deny the request for oral argument.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director concluded that the petitioner qualifies as a member of the professions holding an advanced degree. We will revisit this issue later in this decision. The director's sole stated basis for denial regards the issue of whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

The regulation at 8 C.F.R. § 204.5(k)(4)(ii) requires that a petitioner seeking to apply for the exemption must submit Form ETA-750B, Statement of Qualifications of Alien (or corresponding sections of ETA Form 9089), in duplicate. The record does not contain this required document, and therefore the petitioner has not properly applied for the national interest waiver. The director, however, did not raise this issue. We will, therefore, review the matter on the merits rather than leave it at a finding that the petitioner did not properly apply for the waiver.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now USCIS] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on April 16, 2009. In a letter accompanying the petition, [redacted], president of the petitioning company, listed the beneficiary's numerous administrative and technical responsibilities, including "Plan, direct and coordinate activities of workers engaged in printing, prepress, graphic design, photocopying, mass mailings and desktop publishing"; "Responsible for materials procurement, production planning, capacity planning and inventory receiving management"; and "Arrange for staff scheduling with the client, discuss with client progress of job and changes required by client, organize the delivery of the product/project to the client and discuss the client's changes if needed."

[redacted] then discussed, at length, the benefits of printed advertising materials, stating that they "hold someone's attention far better" than advertisements in other media. These arguments concern the intrinsic merit of print advertising rather than its national scope, or the individual merits of the beneficiary in comparison with others in his field.

[redacted] listed some of the petitioner's clients, including universities, banks, and various businesses, but he did not establish the national scope of the beneficiary's work for the company (for instance, by showing that the petitioner's print advertisements circulate nationally). The petitioner submitted examples of materials printed by the petitioner, such as cover art for a DVD by a magician; a "Cabinet Hardware Price List"; a game schedule for a university basketball team; a hospital employee newsletter; and the cover of a Polish-language magazine. There is no evidence of national distribution of these materials. Addresses shown in the materials are generally in New York and New Jersey; the Polish magazine shows cover prices of "NJ, NY, PA, CT $2.50, Chicago $3.50." A flier for the [redacted] identifies the location as [redacted], but it is not clear where the flier was distributed. (The aforementioned Polish magazine did not claim distribution in or near [redacted]) We note that most of these materials are not print advertisements, despite the petitioner's lengthy dissertation on how print advertisement serves the national interest.

With regard to the beneficiary, [redacted] stated:

> The importance of [the beneficiary's] work cannot be overemphasized and the importance of his skills and services is vital to the advancement of the current advertising and printing technology systems of the country.

> . . . [The beneficiary's] contributions . . . shall serve the National Interest insofar as: (1) improving the U.S.' Advertising and Printing Technology Systems; and (2) improve the conditions of U.S. economy by training and educating newly employed staff who will play starring roles and will contribute to the future U.S. economy; and (3) . . . he possesses [a] very high level of professional development in the area of Printing Technology System which complement the objectives of the U.S. Government in trying to improve the advertising system in the U.S., which will assist the U.S. economy. . . .
>
> Since 2004, as the Prepress Production Manager at [the petitioning company], [the beneficiary] has been involved in an extensive management planning aimed at the development, design and monitoring of a highly-complex system which shall assist [the petitioner's] projects and preliminary testing of various technology systems. . . .
>
> [The beneficiary] will serve as liaison to upper-management at [the petitioning company] and as a conduit for systems users at the organization. [The beneficiary] shall assist in the strategic planning phases for the implementation of the printing technology systems. He shall also be fully responsible for directing and formulating plans for the development and monitoring of printing technology systems.

[redacted] listed the beneficiary's duties with previous employers, and stated that this past work "contributed to his proven-track record of exceptional contributions in the field of Printing Technology Systems and reaffirm why [the beneficiary] is recognized as exceptional in his field of endeavor." (This phrase appears five times in [redacted]'s letter, sometimes with minor variations such as the substitution of the word "reaffirm" with "reiterate.")

[redacted] concluded by asserting that the beneficiary "will be engaged in endeavors that require a level of knowledge and skill that is found only among very few exceptional personnel in his field," and that, if the beneficiary does not receive the waiver, "our nation will be denied a vital resource that has already demonstrated the value that can be added through the implementation of [the beneficiary's] services."

As we have already noted, exceptional ability is not, by itself, grounds for a national interest waiver, because aliens of exceptional ability are generally subject to the job offer requirement. Even then, the question of whether the beneficiary qualifies as "exceptional" is not simply left to the petitioner's subjective discretion. Rather, the USCIS regulation at 8 C.F.R. § 204.5(k)(3)(ii) lists several factors that can contribute toward a finding of exceptional ability. We will revisit this issue later in this decision.

[redacted] letter contains substantial technical details about the nature of the beneficiary's past and present work, such as the assertion that the beneficiary was once "[r]esponsible for the operation and management of indigo digital (hp) 3 image setting, agfa, sellectset and accuset, pre press imaging and sigma station, Photoshop freehand, acrobat, quark express, illustrator (adobe). These details, however, do not, by themselves, distinguish the beneficiary from other experienced workers in the printing industry or explain why he should be exempt from the statutory job offer requirement that would otherwise apply in this proceeding.

With respect to the beneficiary's stated mastery of various printing technologies, simple exposure to advanced technology constitutes, essentially, occupational training which can be articulated on an application for a labor certification. Special or unusual knowledge or training, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Matter of New York State Dept. of Transportation* at 221 (footnote omitted).

On June 11, 2009, the director informed the petitioner of the director's intent to deny the petition, stating that the petitioner had not established the beneficiary's influence on his field or otherwise shown why the beneficiary merits the special benefit of the national interest waiver. In response, counsel stated:

> [The beneficiary's] expertise in the field[] of Printing Technology Systems has enabled him to secure a position assisting the employees of [the petitioner] to produce the highest quality advertisements, for the lowest cost possible, which will ultimately accrue to [the petitioner's] dominance in the field as a company that can provide the highest quality National advertising campaigns for their clients at the lowest cost possible, thus encouraging other companies across the United States to advertise in our current weakened economy to boost their sales, which will thus stimulate the economy.

The above argument relies on a chain of unproven presumptions. Furthermore, the petitioner offers no persuasive argument as to why it would be in the national interest for the petitioner, rather than its countless competitors in the United States, to achieve "dominance in the field." Even if we were to accept the questionable argument that low-cost advertising will accelerate economic recovery, the petitioner has submitted no evidence that it offers its services "at the lowest cost possible"; that those costs are significantly lower than those of other United States printing houses; and that the petitioner is only able to offer these significantly lower prices because of the beneficiary's ongoing involvement.

As before, the arguments in favor of the waiver claim center on the importance of advertising. Also as before, the petitioner submitted samples of printed materials which are clearly not advertisements.

The petitioner submitted three new witness letters. [redacted] of [redacted] stated:

> I have known [the beneficiary] for over ten years and have worked with him on various printing projects, which he both recommended and executed for my company successfully. He utilized special UV techniques which he implemented on a packaging project, which we contracted.
>
> It is my belief that [the beneficiary] possesses exceptional ability in the field of Printing Technology Systems, and in light of this fact, I hereby state that [the beneficiary] will be a great addition to the Printing Technology Field in the US.

The two remaining letters respectively bear the signatures of [redacted] of operations [redacted] Apart from the biographical details of each witness, the two letters are virtually identical, even including the same typographical and grammatical errors. Also, both letters repeat, word for word, assertions from [redacted] earlier letter. Therefore, quoting specific passages from these letters would add nothing of substance to this decision. Like [redacted] these witnesses simply asserted that the beneficiary's efforts in the printing industry will somehow be of significant economic benefit to the United States.

The director denied the petition on September 21, 2009, stating that the petitioner had failed to prove "the general premise that the beneficiary will improve the U.S. Advertising and Printing Technology Systems to a greater degree than any U.S. worker."

On appeal, counsel contends that the director's "legal and factual analysis in the case at hand is completely flawed since the Determination is based upon a failure by the [director] to be familiar with and to understand the realities of the administrative process for a Pre-press Production Manager." At issue here is not "the administrative process for a Pre-press Production Manager," but rather an alien's eligibility for the national interest waiver, which is a special benefit over and above the underlying immigrant classification sought. There is no presumption of eligibility for the waiver, and the beneficiary does not receive the waiver by default because counsel claims that the director does not know enough about the beneficiary's role in the printing industry.

Counsel asserts that, once the beneficiary has a permanent position with the petitioner,

> this would then allow [the beneficiary] to apply for federal grants which would allow [the beneficiary] to enhance the printing industry as a whole.
>
> [The beneficiary] is currently working on cutting edge projects which will decrease the costs of printing and allow [the] US printing industry to compete with offshore printing projects. . . .
>
> Upon receiving federal grants [the beneficiary] will further his research/project [to] design printing processes that will increase natural resources and will further green technology in the printing industry. [The beneficiary's] goal is to advance less chemical intensive printing processes. . . .
>
> [The beneficiary's] current research involves a densitometer which is a device that measures density of a film of ink on paper. . . . [The beneficiary] is currently working on a design which is in the process of being patented. The device . . . will cut out the waste of paper by 40% and ink charge to the rollers . . . [by] about 25%, not to mention the time frame of the printing process will be reduced [by] half. [The beneficiary] has received positive responses [from] the most professional well-known people in the industry located globally with regards to his designs/projects.

Arguments about the importance of print advertising – a keystone of the initial petition – are nowhere to be found on appeal. Instead, the appeal relies on brand new arguments, such as the beneficiary's supposed intention to seek federal grants, research "green technology," and patent new inventions eagerly awaited by unidentified "well-known people in the industry." We cannot reasonably fault the director for failing to take into account arguments that the petitioner had not yet made. More fundamentally, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record contains no evidence to support counsel's string of entirely new claims, a number of which are highly speculative.

The petitioner based the initial petition on a line of argument that has nothing to do with the new assertions on appeal. This near-total shift in focus, coupled with the petitioner's failure to submit any significant evidence in support of either line of argument, leads us to doubt the merits of both claims. We agree with the director's finding that the petitioner has not established the beneficiary's eligibility for the national interest waiver.

Review of the record reveals a very significant issue that the director has not fully addressed. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

In the denial notice, the director stated:

> [The petitioner claimed that] the beneficiary is qualified as a person holding an advanced degree. USCIS agrees that an advanced degree is required by the occupation and that the beneficiary holds an equivalent to a Bachelor's Degree in Business Administration, with a major in Operations Management according to the credential evaluation, in addition to nine (9) years of experience in the field of printing Technology Systems.

The immigrant classification is not for "a person holding an advanced degree." It is, rather, for a member of the professions holding an advanced degree. The regulation at 8 C.F.R. § 204.5(k)(2) defines a "profession" as one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. The beneficiary's occupation is not listed in section 101(a)(32) of the Act, and the petitioner has not submitted any evidence to show that the position requires at least a baccalaureate degree as the minimum requirement for entry into the profession.

Furthermore, the regulation at 8 C.F.R. § 204.5(k)(3)(i) states:

To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:

(A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or

(B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

Under the above regulation, experience can serve in place of an advanced degree, but not in place of the underlying baccalaureate degree. In this instance, [redacted] claimed that the beneficiary "holds a Bachelor's Degree in Business Administration," but the record contains no academic record of such a degree. Rather, according to a credential evaluation in the record: "From 1990 to 1991, [the beneficiary] pursued studies at the [redacted] in [redacted] His studies earned him the Printing Engineer Diploma." The evaluator then considered the beneficiary's work experience and concluded that the beneficiary "has achieved, through his academic credentials and his professional work experience, the equivalent of a Bachelor of Business Administration degree." The evaluator did not claim to have reviewed any actual documentation of the beneficiary's academic record. Rather, the evaluator reviewed the beneficiary's résumé, and "assumed [the beneficiary's claims] to be verifiable."

Thus, the petitioner has not submitted any official academic record, as required by 8 C.F.R. § 204.5(k)(3), and even if the petitioner had submitted such a record, there is no evidence that the beneficiary's one- or two-year degree is equivalent to a United States baccalaureate.

In the June 2009 notice of intent to deny the petition, the director stated "there is no primary evidence that proves" the beneficiary holds the required academic qualifications. In response, counsel stated that the petitioner had "already previously discussed the issue of [the beneficiary's] degree requirements." Counsel repeated the claim that the beneficiary "holds the equivalent of a Bachelor's Degree in Business Administration . . . from an accredited American college or university," but the petitioner submitted none of the required evidence to support that claim.

The record contains no evidence that the beneficiary is a member of the professions, or that he holds either an advanced degree or its defined equivalent. Therefore, we must withdraw the director's finding that the beneficiary qualifies as "a person holding an advanced degree."

There remains to be addressed the question of whether the beneficiary qualifies for classification as an alien of exceptional ability in the sciences, the arts, or business. In the initial submission, the petitioner claimed (through counsel) that the beneficiary qualifies "for Classification as an Alien of Exceptional Ability." Counsel did not specify whether the beneficiary's claimed exceptional ability

was in the sciences, the arts or business. Eligibility is, by statute, limited to exceptional ability in those areas. A generalized assertion of "exceptional ability" cannot suffice.

The USCIS regulation at 8 C.F.R. § 204.5(k)(3)(ii) states:

> To show that the alien is an alien of exceptional ability in the sciences, arts, or business, the petition must be accompanied by at least three of the following:
>
> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
>
> (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;
>
> (C) A license to practice the profession or certification for a particular profession or occupation;
>
> (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
>
> (E) Evidence of membership in professional associations; or
>
> (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

The petitioner has made no coherent claim under any of the above regulatory standards, with the exception of the petitioner's submission of letters from past employers. The petitioner's initial submission included letters from former employers, indicating that the beneficiary worked in the Israeli Army's Northern Command Military Press Room from 1991 to 1994; worked as a press operator for Ram Press from 1994 to 1996; and was operation manager for Makor Press from 1996 to 2001. The petitioner has employed the beneficiary since 2004. (There is reference to another employer from 2001 to 2003, but the record contains no confirmation from that employer.) The beneficiary's experience from 1991 onward appears to satisfy 8 C.F.R. § 204.5(k)(3)(ii)(B).

As we have already noted, the petitioner has also claimed that the beneficiary holds a degree relating to the area of claimed exceptional ability, but the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(A) requires the petitioner to submit an official academic record of such a degree. The petitioner submitted no

such official academic record, and therefore the petitioner has not satisfied the plain wording of this regulation.

Following the initial submission, the petitioner effectively abandoned its claim that the beneficiary qualifies as an alien of exceptional ability, choosing instead to seek to classify the beneficiary as a member of the professions holding an advanced degree. The evidence submitted is not sufficient to establish that the beneficiary qualifies as an alien of exceptional ability, or even that his field of endeavor falls within the sciences, the arts, or business.

Based on the above discussion, we find that the petitioner has not shown that the beneficiary qualifies for classification either as an alien of exceptional ability in the sciences, the arts, or business, or as a member of the professions holding an advanced degree.

The AAO will dismiss the appeal for the above stated reasons, with each considered as an independent and alternative basis for dismissal. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.